

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1203

To be argued by
FREDERICK T. DAVIS

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1203

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN M. EBBECKE,

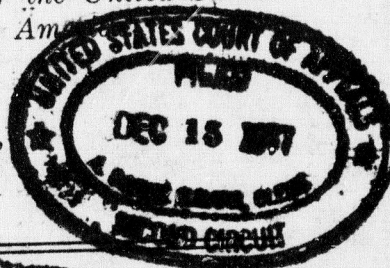
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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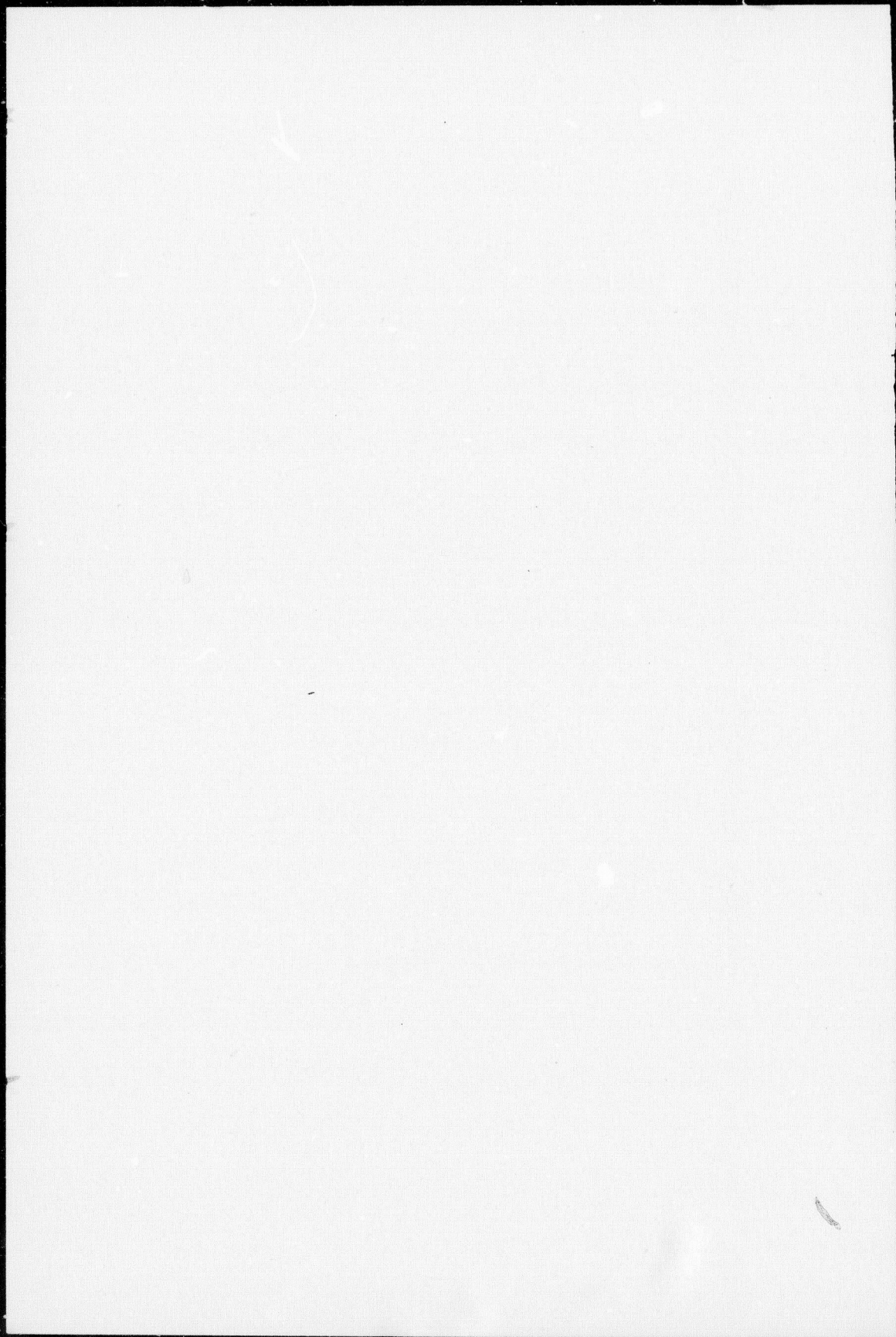


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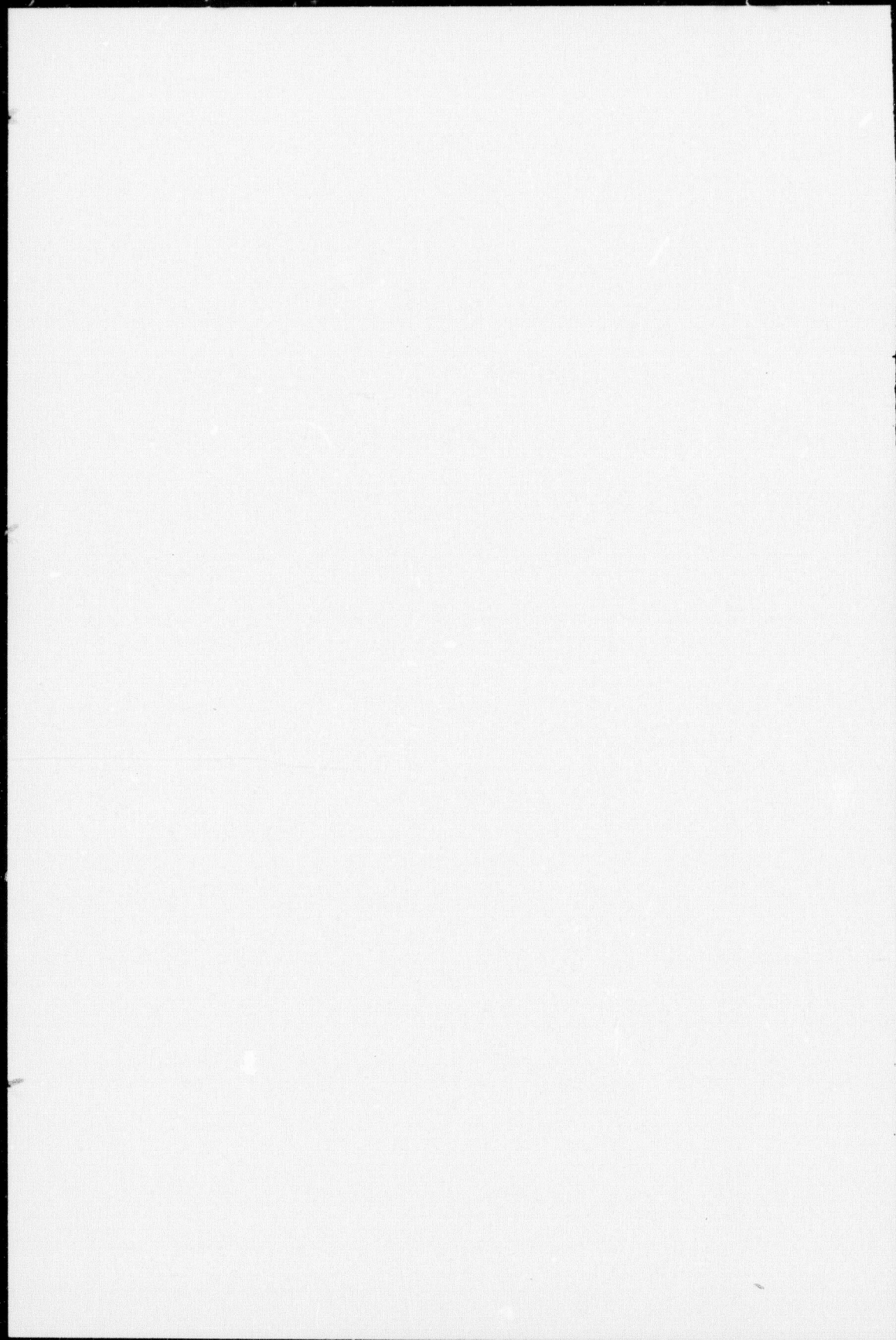
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United States Court of Appeals

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN M. EBBECKE,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

John M. Ebbecke appeals from a judgment of conviction entered on March 11, 1977, in the United States District Court for the Southern District of New York, after a four day trial before the Honorable Robert J. Ward, United States District Judge, and a jury.

Indictment 76 Cr. 999, filed in four counts on October 28, 1976, charged Ebbecke with violations of federal laws relating to bank embezzlement. Count One charged that Ebbecke and Frank W. LeVien,* a bank officer, con-

* LeVien was not named as a defendant in Indictment 76 Cr. 999. On July 15, 1976, he had entered a plea of guilty to two counts of a four count Information, 76 Cr. 658, charging him with embezzling funds from Manufacturers Hanover Trust Co. On September 21, 1976, LeVien was sentenced by Judge Ward to a prison term of one year and one day on one count and a two year term of probation on the second count.

spired to embezzle and to misapply funds from Manufacturers Hanover Trust Company (hereinafter "MHTC"), in violation of Title 18, United States Code, Section 371. Counts Two, Three and Four charged Ebbecke with aiding and abetting LeVien to embezzle funds from MHTC in violation of Title 18, United States Code, Sections 656 and 2.

The trial commenced on January 24, 1977. On January 27, 1977, the jury convicted Ebbecke on all counts. On March 11, 1977, the Court sentenced Ebbecke to concurrent prison terms of one year and one day on Counts One and Two. The Court suspended imposition of sentence on Counts Three and Four and placed the defendant on probation for concurrent periods of two years, consecutive to the prison term under Counts One and Two.

Ebbecke is at liberty pending appeal.*

* Ebbecke's appeal has been delayed by an unusual series of events. At the time of Ebbecke's sentence, his trial counsel, Martin Weinberg, Esq., was replaced by a new attorney, who indicated that he would be in charge of prosecuting the appeal. (Tr. 550). A notice of appeal was then duly filed and this Court issued a scheduling order calling for the filing of Ebbecke's brief by May 23, 1977. When by August 5, 1977, no brief had yet been filed, this Court ordered the appeal dismissed. A surrender order was then issued to Ebbecke, who failed to appear and was therefore arrested. Shortly thereafter, Ebbecke approached his present appellate counsel, Mr. Shargel, who then moved to reopen the appeal on the ground that the failure to file a brief had been solely the fault of prior counsel and, further, that Ebbecke was in ignorance of the true status of the appeal. On September 29, 1977, this Court reinstated the appeal and set a new schedule for it. On October 6, 1977, Judge Ward continued Ebbecke's bail pending the appeal.

Citations to "Tr." refer to the trial transcript, "App." to the appellant's appendix, and "Br" to the appellant's brief.

Statement of Facts

The Government's Case

A. Synopsis.

During 1974, while employed as an Assistant Vice President of MHTC, Frank W. LeVien embezzled and misapplied funds in excess of \$650,000. As a commercial lending officer, LeVien had access to and a measure of control over funds deposited in various checking accounts at the MHTC branch on 42nd Street at Madison Avenue, New York City. During the Spring of 1974, LeVien was asked to pay over \$70,000 as the guarantor on certain loan obligations he had personally incurred. Unable to produce the money from his own funds, he undertook to make withdrawals from some of the accounts that he supervised at MHTC.

Sometime in June 1974, LeVien sought the assistance of the defendant, John Ebbecke. At that time, Ebbecke was functioning as a financial consultant or, more accurately, a loan finder for distressed companies. The two reached an agreement whereby Ebbecke would introduce new commercial accounts to the bank, loans would be granted to these new accounts, and LeVien would be able to use the funds in these accounts to cover his personal shortages. In quick succession, Ebbecke referred the following business accounts to LeVien for loans: Cellini Furniture Corp., Andy's Marine Service, Inc., Alpha Scaffolding and Equipment Company, and Ficarra Furniture Corp. Loans ranging from \$25,000 to \$107,000 were made, and LeVien made full use of his permission from Ebbecke to debit these accounts for his personal use. With Ebbecke's knowledge, LeVien used the Cellini account to make the purchase of a \$125,000 home in Long Island. For his part, Ebbecke had LeVien advance him moneys on an intermittent basis to help pay off his own debts or to make deposits to his own account as needed.

In December 1974, Ebbecke introduced Karl Koch, a wealthy investor, to LeVien. After receiving \$255,000 from Koch for the purchase of a certificate of deposit, LeVien consulted with Ebbecke, and together they decided to have the money deposited in the Alpha Scaffolding account. Ebbecke withdrew \$15,000 from this account for his own use. During the last days of December 1974, when MHTC learned of the circumstances of the non-existent certificate of deposit purportedly purchased by Koch, LeVien was forced to resign from the bank.

The Government called eight witnesses on its direct case: Frank LeVien; Frank Lettieri, the president of Cellini Furniture Company; Frank Leone, the president of Ficarra Furniture Company; William "Jack" Kitson, the president of Alpha Scaffolding and Equipment Company; Karl Koch; Annette Guidice, a former secretary to John Ebbecke; Judah Feinerman; and Gerson Fabe.

B. Origins of the conspiracy.

During 1974, Frank LeVien was an Assistant Vice-President and commercial lending officer at MHTC. (Tr. 83). Sometime prior thereto, in the summer or fall of 1973, LeVien was introduced to John Ebbecke, who was then looking for financing for his boat marina business. (Tr. 85). Although MHTC never did make the loan to Ebbecke, he and LeVien became friends. Ebbecke later left the boat business to become a financial consultant and he and LeVien collaborated on various business deals. (Tr. 86). One of their clients was an entrepreneur by the name of Dash Kalal. LeVien referred Kalal, who had reached his lending limits at MHTC, to Ebbecke for help in obtaining additional financing. (Tr. 88). Sometime thereafter, Kalal appeared at MHTC and advised LeVien that Ebbecke had been successful in obtaining a \$60,000 loan for him at another bank. Thus assured,

LeVien allowed Kalal to deposit a \$60,000 check drawn on the other bank and immediately to write checks on his MHTC account. Unfortunately, the \$60,000 check from the other bank bounced and Kalal's account at MHTC became overdrawn in the amount of \$70,000. (Tr. 89-91). Since Kalal was eager to leave the country on a business trip to Nepal, he and LeVien sought to clear up the overdrawn account by other means. Unable to secure bank financing; LeVien turned to two business and social acquaintances, Judah Feinerman and Henry Levy. Feinerman agreed to lend Kalal \$50,000, interest free, but only on condition that LeVien sign as guarantor. Kalal and LeVien signed a note and Feinerman issued a check for \$50,000. (Tr. 93-94). Henry Levy, the owner of Gatsby's Restaurant, turned over \$20,000 to Kalal, also on the understanding that he could look to LeVien for payment if necessary. (Tr. 95-96). Kalal was thus able to resolve his overdraft at MHTC and leave for Nepal.

C. LeVien pays off the Dash Kalal loans.

On April 22, 1974, Dash Kalal died in an air crash in Bali, Indonesia. Soon thereafter, Feinerman called upon LeVien to honor his obligation on the \$50,000 note. (Tr. 96). Unsuccessful in his attempts to obtain any assistance from Kalal's widow * or Kalal's estate, LeVien discussed the problem with Ebbecke. (Tr. 98). LeVien finally decided that the only way open to him was to take funds from one of the accounts under his control at the bank, pay the loan off, and try "to manipulate the best way [he] could." (Tr. 98). His first target was Chempar Chemical Company, Inc., a medium-size business account. (Tr. 98). He issued from Chempar funds two bank checks payable to Feinerman, one for

* Dash Kalal's widow was the beneficiary of a large insurance policy taken out on Kalal's life. (Tr. 97).

\$25,000 and a second for \$50,000. From the second check, Feinerman was asked to pay \$25,000 to Henry Levy, which he did. (Tr. 98, 153, 276).

D. Ebbecke introduces new business accounts to MHTC to allow LeVien to cover shortages in the manipulated accounts.

After embezzling funds from the Chempar account to pay off the Feinerman and Levy loans, LeVien discussed his problem with Ebbecke, who stated that he understood the situation and "he'd see what he could do to help me." (Tr. 99). Ebbecke then offered to introduce to the bank companies in need of money, whom LeVien could evaluate for lending. A beneficial side effect was that these new accounts could be used to help LeVien with his "problem." (Tr. 101).*

Frank Lettieri, the president of Cellini Furniture Corporation, was the first account brought into the bank by Ebbecke to help LeVien with his problem. (Tr. 101). Lettieri was in financial difficulties at that time and had been referred to Ebbecke for assistance in securing a Small Business Administration loan. (Tr. 237). Ebbecke advised Lettieri that there would be a delay in obtaining the SBA financing and that he was sending Lettieri to Frank LeVien of MHTC, who would give him a temporary loan of \$30,000. (Tr. 241). Unbeknownst to Lettieri, Ebbecke falsely told LeVien that Lettieri knew about LeVien's problem and would be willing to help him out. (Tr. 102). LeVien arranged to make three loans to

* At about the same time in early June of 1974, Ebbecke approached Feinerman for a 30 day loan of \$10,000. Once again Feinerman agreed to advance the funds, conditioned on LeVien's signing as the guarantor. LeVien signed the note and Ebbecke got his \$10,000. (Tr. 277; GX-66, GX-67).

Cellini Furniture Company—\$30,000 on July 8, 1974; \$25,000 on July 26, 1974; and \$52,000 on August 19, 1974. (Tr. 102-03; GX-5). After the \$52,000 had been credited to the Cellini checking account on August 19, 1974, it was immediately debited and put into the Chem-par Chemical account to cover the funds LeVien had used to pay off Feinerman and Levy. LeVien advised Ebbecke of this unauthorized transfer. (Tr. 104).

LeVien and Ebbecke used the Cellini account for their personal advantage. LeVien took \$12,500 to make a 10% down payment on a new home in Plandome, New York.* (Tr. 105). LeVien also used the Cellini account as a conduit—by transferring some of his own meager funds and other embezzled funds into the account—to complete the purchase of his new \$125,000 home. (Tr. 106). Ebbecke, for his part, arranged to have LeVien take \$10,000 from the Cellini account to pay off his note to Feinerman. (Tr. 108-09, 279; GX-11, GX-11A, GX-72). Again, Lettieri learned of this unauthorized debit only after the fact. (Tr. 243-44).**

In similar fashion, Ebbecke directed Andrew Nesbit, the president of Andy's Marine Service, Inc., to MHTC. Ebbecke told LeVien that Nesbit was a friend in the boat business for whom he was in the process of obtaining an SBA loan. Ebbecke also advised LeVien that he could make a loan to Andy's Marine and then take whatever he needed to cover up any debts. (Tr. 112). LeVien made a \$25,000 loan to Andy's Marine and then, without ad-

* Lettieri did not learn of this until he received a copy of the \$12,500 check in the mail. When he called Ebbecke to ask what was going on, he was told that LeVien needed the money for his house. Ebbecke urged Lettieri "not to worry" and that LeVien "will cover your account." (Tr. 253).

** Ebbecke never repaid Lettieri or transferred any money back into the Cellini account. (Tr. 109).

vising Nesbit, transferred \$20,000 into the now-depleted Cellini account. (Tr. 112-13).

William "Jack" Kitson was the president of Alpha Scaffolding and Equipment Company, another troubled business that had been referred to Ebbecke for help. (Tr. 117, 225-56). LeVien granted Alpha a \$70,000 loan and then with Kitson's knowledge withdrew \$65,000, which he wired to a Cellini account in Florida. (Tr. 117). LeVien advised Ebbecke of the unauthorized transfer. (Tr. 118).

Frank Leone, the president of Ficarra Furniture Company, needed financing in early 1974 to buy additional inventory. (Tr. 166-68). Ebbecke examined the Ficarra financial statement and concluded that he could not help Leone. However, a few months later, Ebbecke called to say that he thought he might be able to get a loan. (Tr. 169). Ebbecke took Leone to MHTC to meet with Frank LeVien and LeVien arranged for a loan of \$90,000 to be granted to Ficarra. (Tr. 115, 170-71).

Because LeVien needed funds to cover shortages in several accounts by this time, he spoke to Ebbecke about using the Ficarra account. Ebbecke told LeVien that he was not as close to Leone as to Lettieri but that he would talk to Leone.* Ebbecke added that there would be no problem so long as whatever was taken out was replaced. (Tr. 115). As a result, sometime in September 1974 LeVien transferred \$60,000 out of the Ficarra account into the Cellini, Andy's Marine and Alpha Scaffolding accounts. (Tr. 116). When Ficarra's checks began to bounce due to "insufficient funds," Leone called LeVien

* Leone denied ever giving authority to LeVien, Ebbecke, or anyone else to take funds from the Ficarra account. (Tr. 171).

and Ebbecke to demand an explanation. (Tr. 172). LeVien and Ebbecke decided to call a meeting. (Tr. 119). On or about September 12, 1974, in the late afternoon, LeVien, Ebbecke, Lettieri and Kitson journeyed to the Ficarra showroom in Queens. (Tr. 119-20). Leone appeared briefly in the office to demand that his account be set straight. LeVien and Ebbecke discussed between themselves which accounts needed to be adjusted. In response to LeVien, Ebbecke stated that there was not much that he could do at that time. LeVien therefore announced that he would have to do something at the bank to get the funds. Although LeVien did not disclose the proposed source of the new funds, he did tell Ebbecke that he did not wish to make a direct transfer between two accounts at the same branch. Ebbecke then suggested that LeVien could use Ebbecke's own account, Gramercy Capital, Ltd., which was maintained at the Mineola Branch of MHTC, as a conduit for the funds. (Tr. 121).

E. Ebbecke allows \$75,000 to be washed through the Gramercy Capital account—Count Two.

On September 13, 1974, LeVien arranged for a fraudulent loan of \$75,000 to be credited to the Chempar account. He immediately debited the Chempar account and issued an official bank check to Gramercy Capital, Ltd. (Tr. 122; GX-40; GX-40A). John Duncan, who worked as a chauffeur for Ebbecke (Tr. 224), came to the 42nd Street branch of MHTC, and picked up the \$75,000 check. At the same time, Duncan handed over to LeVien a Gramercy Capital check payable to Ficarra Furniture in the amount of \$68,000. (Tr. 123, 126, 128). The \$75,000 check was deposited by Ebbecke's secretary

in the Gramercy Capital account in Mineola. (Tr. 124, 127, 220; GX-42).*

F. Ebbecke receives \$1,500 in embezzled funds—Count Three.

Toward the end of October 1974, Ebbecke was having difficulty in paying his bills. He told LeVien that he needed money for personal expenses and LeVien agreed to give him a \$1,500 official bank check from the fraudulent loan to Chempar payable to Gramercy Capital, Ltd. After issuing the checks, LeVien endorsed and deposited it to the Gramercy account. By authorizing a "zero delay" for payment on the deposit—thus providing an immediate credit to the account—LeVien was able to cover checks that Ebbecke had already written on the Gramercy account. (Tr. 130-33; GX-52, GX-53).

G. Ebbecke assists LeVien in embezzling \$255,000 deposited with MHTC by Karl Koch—Count Four.

Karl Koch, part owner of a steel erection business, sold his interest in the company in October 1974. As a result, he had \$600,000 available for investment. At about this time he was referred to John Ebbecke for advice on tax shelters. (Tr. 196-97). In November, Ebbecke introduced Koch to Jack Kitson to discuss the possibility of an investment in Alpha Scaffolding and Equipment Company. (Tr. 197, 212). Then on December 14, 1974, arrangements were made for Koch to meet Frank LeVien and another officer of MHTC at Gatsby's Restaurant. (Tr.

* LeVien gave no explanation for Ebbecke issuing a check to Ficarra for only \$68,000 when he was to receive a bank check for \$75,000. As far as Frank Leone was concerned, Ebbecke had already been paid in full for his services as a loan finder. (Tr. 175).

198). Ebbecke had been encouraging Koch to establish a banking relationship and MHTC was the bank he recommended. (Tr. 215-17). During the morning prior to the luncheon meeting, Koch went to an office of the Marine Midland Bank where he received a \$255,000 check, the proceeds of a certificate of deposit (hereinafter "CD") which he held and which had matured. Koch took the check with him to the luncheon with the intention of purchasing a certificate of deposit at MHTC. According to Koch, he did not disclose to anyone at the luncheon the fact that he had the \$255,000 bank check or intended to purchase a CD.* (Tr. 213). LeVien, after meeting with Koch, returned to the bank. Some time thereafter, Koch excused himself from the table to go to speak with LeVien at the bank.** Koch negotiated with LeVien for the purchase of an MHTC certificate of deposit at a 9% interest rate. Because of the late hour, no CD could be issued; rather, LeVien took the \$255,000 check, gave Koch a receipt, and promised that the CD would be sent in the mail.*** (Tr. 202-03; GX-57). Their business completed, Koch and LeVien returned together to join Ebbecke and his entourage at Gatsby's. At the restaurant, Koch told Ebbecke that he had just purchased a CD for \$255,000; Ebbecke seemed impressed. (Tr. 204).

* However, Koch had discussed with Ebbecke generally the fact that he was investing his money in certificates of deposit. (Tr. 199).

** At Ebbecke's insistence, and over Koch's objection, either John Duncan or Jack Kitson accompanied Koch to the bank. Koch instructed his guide to return to Gatsby's while he spoke with LeVien. (Tr. 200-02).

*** LeVien's recollection of the events differed somewhat from Koch's in that he recalled Koch coming to the bank on the afternoon of the luncheon meeting, discussing interest rates on CD's, but not making a purchase at that time. According to LeVien, Koch returned to the bank on the next day, discussed the interest rates again and then purchased the CD for \$255,000. (Tr. 135).

The following day, LeVien spoke with Ebbecke and asked whether the Koch funds could be used "to help me with my situation." (Tr. 136). Ebbecke told LeVien to use as much of the funds as he needed since when the time came for Koch to renew the CD, it would probably be "rolled over." LeVien and Ebbecke then discussed into which account to deposit the \$255,000 and they decided upon the Alpha Scaffolding account. (Tr. 136-37). A few days later, Jack Kitson appeared at the bank and advised that he was told by Ebbecke that a large sum of money had been put into the Alpha Scaffolding account. LeVien confirmed this and gave Kitson several counter checks for his use. According to LeVien, Kitson then wrote out a check for \$2,000, had it cashed, and later, in LeVien's presence, gave the money to Ebbecke. (Tr. 139, 140; GX-59).

LeVien proceeded to use the Alpha Scaffolding account, now brimming with Karl Koch's money, to settle other commitments, including some personal debts. (Tr. 142-43). Just prior to December 20, 1974, when LeVien was about to go on vacation, he reviewed the cancelled checks drawn on the Alpha Scaffolding account during the month. He was surprised to find a \$15,000 check dated December 9, 1974, and drawn to the order of Gramercy Capital, Ltd. (Tr. 142). Jack Kitson himself did not learn of the existence of this check until some time later, after LeVien's discharge from MHTC, when he was invited into the bank for questioning. (Tr. 266). According to Kitson, he had never given Ebbecke permission to write out a check for \$15,000 on the Alpha Scaffolding account. (Tr. 263). Yet all of the writing on the check, with the exception of Kitson's signature, was executed by Ebbecke's secretary, Annette Giudice, and the check was deposited by her in the Gramercy Capital account at the Mineola branch of MHTC. She testified that she received the check from John Duncan, Ebbecke's

chauffeur, and was instructed to fill it out for \$15,000 payable to Gramercy Capital. (Tr. 223-24; GX-60, GX-61). When Kitson learned of this unauthorized payment he was "devastated." (Tr. 266).*

Toward the end of December, Karl Koch attempted in vain to reach LeVien and Ebbecke.** He had not yet received his certificate of deposit in the mail and he wanted to use the CD as collateral for a personal loan from MHTC. When he went into the bank in early January 1975, on the due date of the CD, he was advised that there was no record of such a certificate of deposit and that Frank LeVien had been fired. (Tr. 206-09).

The Defense Case

Ebbecke testified in his own behalf and also called two character witnesses. Ebbecke denied learning of LeVien's illegal activities at the bank until after LeVien's discharge. (Tr. 341). While he admitted representing Dash Kalal, Frank Lettieri, Andrew Nesbit, Frank Leone, and Jack Kitson as a financial consultant, he claimed that his only interest was to obtain proper financing for their businesses. (Tr. 314-16, 320-26, 329-30, 336-37). He specifically denied telling LeVien that he, LeVien, could

* Ebbecke benefitted from the proceeds of the Koch transaction in another manner as well. On December 19, 1974, LeVien issued from the Alpha account a check to one "G. Fabe" in the amount of \$3,150.00. (GX 62, 63). This payment constituted the settlement of a debt incurred by Ebbecke for his personal use. (Tr. 143-48). Gerson Fabe partially corroborated LeVien's testimony on this point. (Tr. 231-36).

** During the last ten days of December 1974, Koch telephoned Ebbecke's office and home eight or ten times, leaving the message with Ebbecke's secretary to call. Although it had been Ebbecke's prior practice promptly to return a call, he did not return any of Koch's calls in late December. (Tr. 208).

make withdrawals from these accounts for his own use. (Tr. 324, 340-41).

With respect to the specific charges against him, Ebbecke admitted some of the events, but denied the inculpatory details provided by the Government witnesses. For example, Ebbecke confirmed that there had been a meeting at the Ficarra Furniture showroom and that he, LeVien, Lettieri, Kitson and Leone were present. However, Ebbecke claimed that the meeting was called because Leone had been promised a \$150,000 line of credit by MHTC but had only been granted \$90,000. As a result, Ficarra checks were bouncing and Leone was "screaming." LeVien agreed to straighten out this "embarrassing problem" and the meeting ended. (Tr. 328-30). A few days later, according to Ebbecke, LeVien called him up from New Jersey and asked for a favor to placate Leone. Ebbecke was to draw money out of his own account, Gramercy Capital, Ltd., and deposit it into the Ficarra account. When Ebbecke objected that he didn't have \$68,000 or \$75,000 to give Ficarra, LeVien responded that he would cover him later with a check for \$75,000. Thus assured, Ebbecke instructed his secretary to make out a check to Ficarra for \$68,000. He testified that there was a fee owing to him from Leone and that he told Leone he was taking the difference in payment of the fee. On the following day, a \$75,000 check was delivered to his secretary. (Tr. 330-31, 350-51).

As to the \$1,500 bank check payable to Ebbecke, he testified that this represented a personal loan which he sought and obtained from LeVien.* He did not know

* Ebbecke testified that LeVien had an independent source of funds other than his salary as a junior bank officer. In particular, he claimed to have been told by LeVien that LeVien was working for Chempar Chemical as a consultant. (Tr. 355-57).

the source of the loan. No note was ever signed evidencing the debt. (Tr. 340, 366).

Ebbecke denied receiving \$2,000 in cash from Jack Kitson in December 1974. (Tr. 335). He also stated that he received a blank check signed by Jack Kitson, discussed with Kitson the amount of money owing to him for his work on behalf of Alpha Scaffolding, and was told by Kitson to write out the payee (Gramercy Capital) and the amount (\$15,000). The only reason Kitson did not fill out these items on the check himself was because there was some dispute as to how much money he had available in the account when the check was handed over. (Tr. 362-64).

Ebbecke admitted that the \$10,000 bank check used to repay Feinerman came from Frank Lettieri's Cellini account. However, he claimed he was entitled to this amount as a fee for obtaining the loan from MHTC. Although he did not request this deduction or advise Lettieri about it, Ebbecke was told by LeVien that Lettieri had been so notified and it was Ebbecke's belief that his secretary sent Lettieri a receipt for \$10,000. (Tr. 360-61). Finally, Ebbecke testified that he was unaware of the agreement between LeVien and Gerson Fabe that LeVien guaranteed up to \$4,000 of the loan \$10,000 loan taken out by Fabe for Ebbecke. Ebbecke did not learn that LeVien had paid off the balance owing on the loan until the summer after LeVien had been discharged from the bank. (Tr. 310-11, 381-82).

The Government's Rebuttal Case

Frank LeVein was recalled briefly to testify that he had never been employed as a consultant by the Chempar Chemical Company, its parent company, or any other

company during 1974 when he was an officer of MHTC.* (Tr. 395-96). The balance of the rebuttal case related to a separate fraudulent financial transaction engineered by Ebbecke during March and April of 1974. This evidence was admitted as a prior similar act, probative on the issue of knowledge and intent. The jury was so charged. (Tr. 397, 412, 511).

The gist of the similar act was this: In order to stall a client for whom he was attempting to line up financing, Ebbecke issued a fraudulent letter of commitment for \$500,000 and a fraudulent letter of credit for \$200,000 on stationery of the Hempstead Bank. When the client became suspicious, Ebbecke pressured the bank officer whose signatures had been forged on the fraudulent letters to verify that he had in fact signed the letters. The client, David Kaplan, and the bank officer, Lester Wadsworth, both testified.

David Kaplan was the president and sole owner of National Motorcycle Plan, Inc., an insurance agency in the Bronx. He was introduced to Ebbecke in early March 1974 for the purpose of obtaining a \$50,000 loan. He also was seeking a \$200,000 letter of credit to present to an insurance company with which he was doing business. (Tr. 398-401). During the course of several meetings at Ebbecke's office in Mineola, Kaplan's attorney and Ebbecke worked out the terms of the letter of commitment. Kaplan and his attorney were told that the letter (typed by the bank) would be delivered by John Duncan, and Kaplan would then pay over \$10,000 for services rendered. (Tr. 402). That afternoon, John Duncan arrived with a letter of commitment for \$500,000 from the Bank of Hempstead. (Tr. 403; GX-76, GX-77).

* Ebbecke had asserted that LeVien worked for Chempar. (Tr. 355-57, 365).

Kaplan later received a copy of a letter of credit for \$200,000, the original of which had purportedly been sent by the Hempstead Bank to the First National City Bank. (Tr. 403; GX-75). However, when Kaplan was unable to learn from the First National City Bank whether it had received the letter of credit, he called Lester Wadsworth, the officer of the Hempstead Bank whose signature appeared on the letter of credit as well as on the letter of commitment. Wadsworth expressed total ignorance of Kaplan and the National Motorcycle Plan, Inc. (Tr. 403-05). Kaplan and his attorney immediately drove from the Bronx to Ebbecke's office in Mineola. Ebbecke attempted to placate them by stating that Wadsworth did not like to discuss such matters over the telephone. Kaplan's attorney asked Ebbecke to have Wadsworth come upstairs from the Hempstead Bank branch in the building to speak with them. Some time later, Lester Wadsworth appeared in the office. When asked if he had signed the letter of commitment and the letter of credit, Wadsworth stated that he had. At the request of Kaplan's attorney, Wadsworth initialed one of the letters. Kaplan and his attorney then returned to the Bronx. (Tr. 405-06). Sometime thereafter, Kaplan was asked to return the letter of commitment and his copy of the letter of credit. He did so but retained photostatic copies. (Tr. 406-08). Financing arrangements for Kaplan were ultimately made by Ebbecke and his business partner, Jim Feeney, with a different bank. (Tr. 416-17).

Lester Wadsworth testified that when he was manager of the Hempstead Bank, Mineola branch,* he had no authority to make loans in excess of \$15,000, nor to issue letters of credit. (Tr. 428). He never issued or signed the letter of commitment or letter of credit in question.

*Wadsworth was asked to resign from the bank when his attempt to conceal this transaction was discovered. (Tr. 431).

(Tr. 427-28). In fact he had never heard of David Kaplan until someone by that name telephoned him one day at the bank. (Tr. 422). Shortly thereafter, someone from the First National Bank called him to verify a letter of credit for First National Motorcycle Sales. Wadsworth directed the caller to the main office of the Hempstead Bank where letters of credit were issued. (Tr. 422-23).

Wadsworth thereafter received a call from Ebbecke, who requested Wadsworth to come to his office and identify himself to a Mr. Kaplan as an officer of the Hempstead Bank. Ebbecke reminded Wadsworth that he had recently loaned him \$2,400, interest free, to purchase an automobile, that Wadsworth, who was earning only \$15,000 per year (Tr. 428-29), would have difficulty repaying the loan, and that he could just let the loan "ride" (Tr. 425-26)—in other words, Wadsworth could forget about paying off the \$2,400 loan. (Tr. 436). Wadsworth relented and went up to Ebbecke's office, introduced himself and placed his initials below the forged signature of his name on Kaplan's copy of the letter of credit. After he left the room, Wadsworth spoke with Ebbecke and told him that there would be trouble unless the fraudulent letters were returned. Ebbecke stated that he would talk to Wadsworth as soon as Kaplan and his associate were out of earshot. (Tr. 426-29). Several days later, Ebbecke explained to Wadsworth that the letters were just a stall while they tried to get a letter of credit for Kaplan from a different bank. Since Kaplan was pressuring Ebbecke and his partner, they gave him the fraudulent letters for show. As soon as the real letter of credit came through, they would pull the Hempstead Bank letter of credit and substitute the other. (Tr. 430-31). The documents that Wadsworth insisted be returned were delivered to him by Ebbecke's partner and were then destroyed. (Tr. 431).

ARGUMENT

POINT I

The Evidence Was More Than Sufficient.

Ebbecke's first claim is that the evidence adduced at trial was insufficient to support his conviction on any of the four counts against him. Ebbecke appears to agree that LeVien's self-confessed activities amply demonstrated LeVien's culpability in the bank embezzlement scheme of which he was concededly the principal architect. Nor does he seriously question the established law that a person such as Ebbecke who could not be guilty as a principal because of his status as a non-bank officer may nonetheless be an aider and abettor, see Br. 19; *Coffin v. United States*, 162 U.S. 364 (1895); *United States v. Giordano*, 489 F.2d 327, 330 (2d Cir. 1973). Cf. *United States v. Cleary*, Dkt. No. 77-1107, slip op. 6329, 6332-33 (2d Cir., Oct. 20, 1977). His sole claim is that while the crimes themselves were adequately demonstrated, the evidence connecting Ebbecke to those crimes was insufficient. In fact, a review of the record as a whole convincingly shows that the evidence of Ebbecke's complicity was overwhelming.*

* Once the occurrence of criminal acts has been established, the amount of evidence necessary to conclude that a defendant was a member of a conspiracy to commit those crimes has been characterized by this Court as "slight." *United States v. Marrapese*, 486 F.2d 918 (2d Cir. 1973), cert. denied, 415 U.S. 994 (1974); *United States v. Mejias*, 552 F.2d 435, 445 (2d Cir. 1977). Indeed, in the recent decision of *United States v. Hanlon*, 548 F.2d 1096, 1100 (2d Cir. 1977), this Court noted in assessing the evidence against one defendant (also in the context of a scheme to defraud a bank of large sums of money):

"There was evidence that Katritsis was a confidant of [the principal malefactor] and did his 'personal' typing, despite his limitation to a 'hunt and peck' technique. It

[Footnote continued on following page]

The long-established criteria for determining whether a defendant was an aider and abettor is that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." *United States v. Licursi*, 525 F.2d 1164, 1167 (2d Cir. 1975); *United States v. Bommarito*, 524 F.2d 140, 145 (2d Cir. 1975); *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938), quoted in *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). In addition, of course, the Government must show that the defendant had the requisite knowledge and intent to make his actions criminally culpable. Cf. *United States v. Tavoularis*, 515 F.2d 1070, 1074-77 (2d Cir. 1975). In this case, those requirements were more than satisfied. Ebbecke was not only intimately aware of LeVien's personal financial difficulties that led to his crimes, but was consulted by LeVien at the conspiracy's very inception as to the best means for LeVien to raise money.* Thereafter, Ebbecke

was reasonable for the jury to infer knowledge of [the principal's] criminal scheme from this." *Id.* at 1100.

In this case, of course, Ebbecke did far more than LeVien's typing; as the facts show, he consulted with LeVien on the details of the scheme from the very beginning, provided crucial assistance in furtherance of the scheme, and directly benefitted from the ill-gotten proceeds of the crime.

* In his brief, Ebbecke twice makes much of LeVien's apparent correction of his own testimony when LeVien stated "it was decided—I decided" to defraud the bank (Tr. 98; Br. 4, 23 (emphasis by Ebbecke)). Ebbecke apparently relies on this statement to support his position that he did not participate in the scheme or have knowledge of it. Aside from the fact that the jury might well have credited the first version of the statement on the belief that in the second LeVien was consciously attempting to minimize the culpability of a person who had been his friend, see *United States v. Marchand*, Dkt. No. 77-1131, slip op. 5391, 5392 (2d Cir., August 22, 1977), rehearing denied, slip op. 6371 (2d Cir., November 1, 1977), the statement at the very least demonstrates that Ebbecke was aware of LeVien's plan. In addition, Ebbecke's reliance on this statement overlooks LeVien's testimony on the

[Footnote continued on following page]

was consulted by LeVien during almost every episode of the six-month series of financial cover-ups that culminated in the discovery of LeVien's portion of the crime. During the course of these activities, Ebbecke offered and provided crucial support that allowed LeVien to continue his escapades undetected. First and foremost, he provided LeVien with a string of new accounts from which LeVien could extract funds and rely on Ebbecke to lull the account holders into inaction or to provide temporizing excuses when the deficits were discovered.* With respect

next page of the transcript that, after LeVien had made his first unauthorized use of a bank account, "I told John [Ebbecke] that I was responsible for this money which I then paid out, and I told him that I would have to repay the money to Judd Feinerman and to Henry Levy and that I had to make some arrangements to do this because the pressure was being put on me to repay this amount of money. So John then said he understood and he'd see what he could do to help me." (Tr. 99).

* That Ebbecke's intent was to provide fatted calves specifically for LeVien's slaughter was emphasized by LeVien:

Q. Did John Ebbecke propose to assist you in the problem that you now found yourself in?

A. Yes.

Q. What did he propose to do or what was said?

A. Well, corporations that were looking to borrow money could be introduced to the bank and I could evaluate them as to their possibility of obtaining bank funds, that the people that he would be sending to me undoubtedly would be the presidents of the corporations and would be in a position to try to help me in my problems. (Tr. 101).

Furthermore, the record is clear that Ebbecke did not contemplate merely that the corporation presidents he presented to LeVien would voluntarily help LeVien out of the goodness of their hearts. For example, with respect to the Cellini Furniture Corporation account, while Ebbecke told LeVien that "he had spoken with Frank Lettieri and that he told Frank Lettieri that I had a problem and that Frank Lettieri, when he came into the bank, would be willing to help," (Tr. 102), Lettieri in fact was wholly unaware of LeVien's debts or LeVien's plans to use his funds. (Tr. 241). Similarly, while Ebbecke later told LeVien that Lettieri consented to the withdrawal of \$10,000 from the Cellini account to pay one of Ebbecke's own debts (Tr. 108), Lettieri in fact did not even know of the withdrawal until checks on the account bounced. (Tr. 243).

to the first such victim, Lettieri, Ebbecke brought Lettieri to LeVien after falsely telling LeVien that Lettieri knew about his "problem." (Tr. 102).^{*} After LeVien arranged for a \$30,000 loan to Lettieri's corporate account, the money was diverted to LeVien's personal use (Tr. 106) and that of Ebbecke. (Tr. 108-09, 229; GX 11, 114). When Lettieri complained to Ebbecke that he had not yet received the proceeds of the loan and "was tight for money," (Tr. 242), Ebbecke—who knew that the loan money had been diverted by LeVien (Tr. 104, 106)^{**}—merely told Lettieri "maybe I can get you additional money until the loan comes through." (Tr. 242). Similarly, Ebbecke introduced Andrew Nesbit to LeVien, expressly urging LeVien to embezzle "whatever he needed"

^{*} Later, when in August 1974 the mounting deficits began to appear, LeVien asked Lettieri "was it mentioned to you by John that I had a problem." (Tr. 110). Ebbecke in his brief at 6 quotes LeVien's recital of Lettieri's response—"He says to me 'Yes'"—apparently to bolster his contention that his conduct was wholly above-board. This, however, is in flagrant disregard of the fact that LeVien's answer was stricken from the record at Ebbecke's request. (Tr. 110-11). Significantly, Lettieri emphasized that he did not know about LeVien's depredations until after checks bounced. (Tr. 252-53).

^{**} During LeVien's direct testimony, the following interchange occurred:

Q. Did you advise John Ebbecke that you were using funds from Cellini to pay for the purchase of your house?

A. Yes.

Q. What, if anything, did he say?

A. He didn't say anything. Basically, I just told him what I was doing and he offered to help.

Q. Did you ask—

THE COURT: What, if anything, did he say?

THE WITNESS: He just said to me he offered to help, and since I said to him that the Cellini account would be used, that he would offer to help by talking to Frank Lettieri, the president of the company. (Tr. 106).

from Nesbit's account once a loan had been effected.* LeVien then transferred \$20,000 into the Cellini account to cover his prior depredations.** Similarly, with respect to Kitson and Leone, Ebbecke brought the victims to LeVien, who then informed Ebbecke of his misuse of their respective accounts (Tr. 115, 117-18), which he accomplished wholly without their consent. (Tr. 261).

In September 1974, Ebbecke's aid to LeVien reached a new phase. When the victims of LeVien's activities threatened disclosure, LeVien told Ebbecke that he needed to make further transfers to cover up the growing deficits, and that he could not use a further account at the same bank. (Tr. 121). Ebbecke then suggested that LeVien use the Gramercy Capital Corp. account, which Ebbecke maintained. As a result, LeVien transferred \$75,000 from the Chempar account to Ebbecke's Gramercy account, and Ebbecke, through his chauffeur and secretary, and transferred \$68,000 from Gramercy to Leone's Ficarra Furniture account.*** (Tr. 122-28, 220-24; GX 42). In

* LeVien's direct testimony:

Q. What, if anything, did you say to John Ebbecke?

A. I said to him that I had the problem at the bank to cover up these accounts as they were created, and he said when Andy [Nesbit] came in, if you could make a loan, to take whatever you needed to cover up whatever I had to cover up and that he would speak to Andy, because I got the impression he was very close with Andy.

** Nesbit clearly did not consent to the transfer. While Ebbecke told LeVien that he "would speak to Andy" about LeVien's problem, when Nesbit in fact appeared at the bank he had not been so informed by Ebbecke. (Tr. 112).

*** Since Ebbecke clearly knew that the transfer through the Gramercy account was for the purpose of covering LeVien's fraudulently induced deficits (even though he apparently did not know the precise source of the funds), his participation in the scheme clearly amounted to a "misapplication" of the funds as the term is used in 18 U.S.C. § 656, and as charged in Count Two and the conspiracy count of the indictment. Compare *United States v. Fortunato*, 402 F.2d 79 (2d Cir. 1968), *cert. denied*, 394 U.S. 933 (1969) with *United States v. Docherty*, 468 F.2d 989 (2d Cir. 1972).

addition, during the latter period of the conspiracy—that is, well after Ebbecke had had specific and repeated statements to him by LeVien about the nature of LeVien's deceit—Ebbecke himself shared directly in the profits of the scheme. In October 1974, Ebbecke told LeVien he “needed some funds . . . for personal reasons.” (Tr. 131). LeVien obligingly debited the fraudulently-increased Chempar account and drew an official check to Ebbecke's corporation for \$15,000. (Tr. 130-33; GX 52, 53). Finally, of course, Ebbecke led Karl Koch—who had indicated he had hundreds of thousands of dollars to invest—to LeVien. After LeVien essentially stole \$255,000 from Koch by falsely telling Koch that the money was invested in a certificate of deposit, LeVien explicitly informed Ebbecke of the event, and together they decided to transfer the money into the Alpha Scaffolding account. Ebbecke then arranged for \$15,000 of this money to be transferred to his Gramercy Capital account.*

On the record of these facts, Ebbecke's complicity was overwhelmingly demonstrated. Not only did he “associate himself with the venture [and] participate in it,” *United States v. Peoni, supra*, 100 F.2d at 402, but he actually benefitted from it to the extent of many thousands of dollars. From this last fact alone Ebbecke's “desire to forward” the plan (Br. 19) was obvious. Furthermore, Ebbecke's assertion that with respect to each of the substantive counts against him he was not shown to have had specific knowledge of the criminal nature of the transaction is preposterous. Ebbecke was specifically informed by LeVien of the details of virtually all of his criminal acts beginning as early as July 1974;

* As indicated in the statement of facts, p. 12-13, *supra*, the check was apparently signed by Kitson himself, but the rest of it was filled out by Ebbecke's secretary, and was delivered to her by Ebbecke's chauffeur. Kitson clearly did not authorize the transfer; indeed, he was “devastated” when he learned of it.

indeed, as indicated above, Ebbecke not only counseled LeVien on his actions, but promoted them by bringing new accounts to the bank *after* he knew that LeVien plundered the accounts he already had. In the face of this continuous activity, to claim that Ebbecke thought that the \$75,000 he "washed" through the Gramercy account or the \$1,500 he received from LeVien came from anything other than LeVien's criminal activity requires "a naiveté from which ordinary citizens are free." *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977). While the Government bears the burden of producing evidence from which a jury—drawing "justifiable inferences of facts"—"might fairly conclude guilt beyond a reasonable doubt," *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972), there is no requirement that the inference relied upon by the Government be compelled by the evidence or that they foreclose all inferences supporting innocence. *Holland v. United States*, 348 U.S. 121, 139-40 (1954); *United States v. Taylor*, *supra*, 464 F.2d at 244; *United States v. Grunberger*, 431 F.2d 1062, 1066 (2d Cir. 1970). Rather, as this Court has reaffirmed, "The prosecution . . . is under no duty to negate all possible innocent inferences from a set of circumstantial facts . . ." *United States v. Singleton*, 532 F.2d 199, 203 (2d Cir. 1976). Indeed, with specific reference to the issue of whether a defendant had knowledge of the falsity of statements made in connection with a scheme to defraud a bank, this Court has noted—on facts far less compelling than these—that the jury could appropriately draw an inference of knowledge from the continuing association of the defendant with the other perpetrators, and also could infer knowledge of complicity in one count from demonstrated complicity in another count. *United States v. Hanlon*, *supra*, 548 F.2d at 1099-1100.* In short, the

* This Court has long noted that the evidence of knowledge, viewed as a whole, acquires a significance beyond that of its component parts. *United States v. Bottone*, 365 F.2d 389, 392 (2d

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evidence of Ebbecke's guilt provided in the Government's direct case alone was overwhelming.*

Cir.), *cert. denied*, 385 U.S. 974 (1966); *United States v. Wisniewski*, 478 F.2d 274, 279-80 (2d Cir. 1973); *United States v. White*, 124 F.2d 181, 185 (2d Cir. 1941). As Judge Hand wrote, with respect to an inference of criminal knowledge,

"[L]ogically the sum is often greater than the aggregate of the parts, and the cumulation of instances, each explicable only by extreme credulity or professional inexperience, may have a probative force immensely greater than any one of them alone."

United States v. White, *supra*, 124 F.2d at 185.

* This sufficiency may properly be assessed by comparing this Court's decision in *United States v. Ianelli*, 461 F.2d 483 (2d Cir. 1972) with *United States v. Docherty*, *supra*, 468 F.2d 989. In *Ianelli*, the Court found sufficient the evidence against the defendant Squires when his role had merely been that of a "straw man" between a corrupt bank officer, Michaels, in an effort to transfer money to a guilty beneficiary, Ianelli. Even though the case involved the relatively difficult legal issue of whether the actions constituted a "wilful misapplication" under 18 U.S.C. § 656, while the acts in this case clearly constituted a plain "embezzlement" under the same statute, the Court found acts far less compelling than those against Ebbecke to be sufficient to sustain a conviction. In *Docherty*, by contrast, the Court reversed a conviction for insufficient evidence of a "wilful misapplication" under Section 656. Specifically noting in the second sentence of the opinion that Docherty "neither obtained nor sought any personal gain," 468 F.2d at 991, the Court emphasized preliminarily that there was no evidence that the defendant knew the bank officer "intended to embezzle, abstract or purloin moneys." The Court concluded that the act of merely putting his "own credit on the line," *id.* at 995, to arrange a loan to a bank officer who was not permitted to borrow from the bank directly, did not constitute a "wilful misapplication," at least in the absence of knowledge by the defendant that he was violating a specific bank rule. Here, by marked contrast, Ebbecke specifically knew from his long course of dealing that LeVien was purloining money for, *inter alia*, the repayment of prior debts and for the purchase of a house; further, of course, Ebbecke himself benefitted from his actions. In short, Ebbecke's case is clearly governed *a fortiori* by *Ianelli*, and not by *Docherty*.

Finally, the Government's direct case—which alone is discussed in Point I of Ebbecke's brief—was not the only evidence before the jury. Ebbecke testified in his own behalf, and his testimony directly contradicted not only the testimony of several of the Government's witnesses but also that of the rebuttal witnesses as well. Thus, the jurors were not only entitled to disregard entirely his protestations of innocence, *United States v. Armantrout*, 411 F.2d 60, 66 (2d Cir. 1969), but could draw appropriate negative inferences from the incredibility of and discrepancies in his story. *United States v. Mariani*, 539 F.2d 915, 920 (2d Cir. 1976); *United States v. Pui Kam Lam*, 483 F.2d 1202, 1208 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *United States v. Arcuri*, 405 F.2d 691, 695 (2d Cir. 1968) *cert. denied*, 395 U.S. 913 (1969). See generally, *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952) (L. Hand, J.). In addition, as will be discussed in more detail in Point II, the jurors properly had before them similar acts that were particularly probative of the precise element—guilty knowledge—that Ebbecke claims was insufficiently demonstrated. This Court has routinely looked to similar acts introduced against defendants in assessing the sufficiency of the evidence against them. See, e.g., *United States v. Stanchich*, *supra*, 550 F.2d at 1300.*

*The evidence of Ebbecke's guilt on the conspiracy count included not only all the evidence on each of the three substantive counts—which were reiterated in the conspiracy count as overt acts—but also Ebbecke's extensive dealings and conversations with LeVien in the stages of the conspiracy prior to the \$75,000 "wash" transaction charged in Count Two, including the misuse of the accounts of Lettieri, Nesbit, Kitson and Leone. Since the jury was overwhelmingly justified in inferring an "agreement" to violate the embezzlement laws from those acts, the sufficiency of the evidence on the substantive counts is demonstrable "alternatively", see *United States v. Jackson*, 560 F.2d 116, 121 (2d Cir. 1977) on the theory of *Pinkerton v. United States*, 328 U.S. 640 (1946). *United States v. MacDougal-Pena*, 545 F.2d 833, 835 (2d Cir. 1976).

POINT II**Evidence of a Similar Act Was Properly Admitted.**

Ebbecke's second claim is that the District Court improperly admitted evidence that during 1974, only two or three months before his criminal activity with LeVien commenced, Ebbecke issued a fraudulent letter of commitment and a fraudulent letter of credit on a Long Island bank in an effort to stall a client, and then covered the matter up by inducing the bank officer to lie about it. The claim should be rejected.

Since the events at trial leading to the admission of the similar act are portrayed in Ebbecke's brief in only the most selective manner, and since they have considerable bearing on the ultimate question of whether the district judge acted arbitrarily or irrationally, those events will be briefly recounted here. During the course of the Government's proof, Government counsel first broached the issue of the similar act with the Court and sought a ruling on it.* (Tr. 182-92). After giving a detailed description of what the similar act evidence would entail, and after noting that the cross-examination of LeVien had suggested a defense based upon lack of knowledge and intent, the prosecutor urged that the similar act "goes to the issue of intent, your Honor, because basically, as I understand the defense here, it is Mr. Ebbecke's contention that he may have been present or he may have been involved with Mr. LeVien, but he did not know what LeVien was doing. I think the intent and knowledge are squarely raised." (Tr. 183). The district judge engaged in a lengthy discussion of the matter with both counsel, in

* As Ebbecke notes, the discussion occurred after the Government's first witness had testified, when Ebbecke's defense of lack of knowledge and intent became apparent through his cross-examination of LeVien.

which he noted "I wonder if this would not better be left for rebuttal." (Tr. 185). After hearing further discussion, Judge Ward explicitly noted that he would permit cross-examination on the matter and would permit proof in rebuttal, but would not allow the evidence during the Government's direct case. (Tr. 191-92).

At the close of the Government's case, the prosecutor again offered the similar act evidence, again stressing "the critical issue here of knowledge and intent" as developed by the defense during cross-examination. (Tr. 286). Noting that knowledge and intent were "certainly" at issue,* the Court tentatively adhered to its prior decision. (Tr. 289). When the defendant then indicated that he definitely would testify, Judge Ward immediately determined that the similar act evidence would not be admitted in the Government's direct case, but would probably be admitted in a rebuttal case. (Tr. 295).**

Ebbecke then testified. See p. 13-15, *supra*. On cross-examination,*** the prosecutor asked him about the Hemp-

* Ebbecke explicitly conceded that the issues of knowledge and intent were "vital" to the case. (Tr. 289).

** Ebbecke in his brief states that this final ruling occurred "after the luncheon recess." (Br. 26). In fact, it occurred prior to the recess. (Tr. 295-96).

*** Ebbecke notes that the prosecutor indicated before the jury that the cross-examination was directed to the issue of credibility (Tr. 371), and apparently seeks to imply from this that either the prosecutor or the court or both were confused about why the evidence was admitted. (Br. 27-28). First, *cross-examination* (as opposed to the offer of extrinsic evidence) about Ebbecke's acts was clearly proper to impeach him under F.R.Evid. 608(b), since the acts—which involved Ebbecke's attempts to force a bank officer to lie for him—clearly related to truthfulness and veracity. Indeed, since the discussion was in the presence of the jury, it would have been highly improper for the prosecutor to refer to similar acts, when the judge had not yet ruled definitely on the admissibility of those acts. *United States v. Lord*, Dkt. No. 72-1157, slip op. 347, 353 (2d Cir., Nov. 15, 1977). In addition, the fact that the similar act also affected credibility did not vitiate its admissibility

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stead bank transaction. Consistently with his position with respect to the LeVien matters, Ebbecke stated that he did not know the letters were fraudulent, and specifically denied that he induced Wadsworth to initial the letter. (Tr. 374-81).^{*} At the conclusion of Ebbecke's case,

under F.R.Evid. 404(b). See *United States v. Ross*, 321 F.2d 61, 67 (2d Cir.), cert. denied, 375 U.S. 894 (1963), 3 Weinstein, *Evidence*, 608[06], at 608-31, n.1 (1975). Furthermore, while the prosecutor on one occasion at side-bar did refer to the offer of the substantive proof as affecting credibility (Tr. 385), the District Court indicated that it was wholly conscious of the restriction of Rule 608(b) regarding the inadmissibility of extrinsic proof. Ebbecke's remark that the prosecutor "quickly shifted gears and relied on the substance of Rule 404(b) to admit the testimony," Br. 29, is thus totally disingenuous since the prosecutor had noted that the proof was admissible to prove knowledge and intent from the very first mention of the matter (Tr. 183) and during other lengthy portions of the discussion as well. (See, e.g., Tr. 286, 310). In short, the reference to extrinsic proof of a bad act affecting credibility was at most a momentary confusion that had no effect on the vigilant and well-informed judge.

^{*} Ebbecke states that the cross examination in this regard "best can be described as inartful . . ." (Br. 28). In fact, as a reading of the record in its entirety reveals, the difficulty in the cross-examination stemmed wholly from the extraordinary lengths to which Ebbecke went to avoid giving straight answers to relatively simple questions. (See, e.g., Tr. 373, 376, 378).

Two other ancillary remarks in Ebbecke's brief merit short response. First, Ebbecke attempts to give the Court the impression that this was a very close case since it was based solely upon the word of LeVien, who, Ebbecke claims, testified in an effort "to soften the consequences of his acts." Br. 23. In fact, LeVien had already been sentenced and the time for a motion to reduce sentence had already run prior to his testimony. More fundamentally, Ebbecke's testimony was seriously inconsistent not only with that of LeVien but also with that of other Government witnesses. Lettieri, for example, totally refuted Ebbecke's claim that the \$10,000 Ebbecke received from the Cellini account to repay Feinerman constituted commission for work he had done for Lettieri; similarly, Kitson explicitly noted that the \$15,000 check Ebbecke arranged to have him sign to Gramercy Capital was

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Kaplan and Wadsworth testified, pursuant to a limiting instruction to which no objection was made. (Tr. 384). See pp. 16-18, *supra*.

Particularly in this context—demonstrating the extraordinarily careful, considered approach of the district judge—the decision to admit the similar act evidence cannot be faulted.* Ebbecke does not seriously dispute that the

done without his authorization. In addition, Gerson Fabe disputed Ebbecke's claim that LeVien's use of bank funds to repay Ebbecke's debt to Fabe was made because Fabe had put Ebbecke out of business. In short, while LeVien was the focus of the Government's case, his testimony was amply corroborated by other witnesses, as well as by the unanswerable documentary proof that Ebbecke profited from LeVien's misdeeds.

Second, Ebbecke suggests that the District Court gave the Government more than its due in allowing proof of events antedating the overt acts in the conspiracy count. (Br. 24). Wholly apart from the absence of any objection in this regard, evidence of facts antedating a conspiracy is clearly admissible to show its "background," *United States v. Colasurdo*, 453 F.2d 585, 591 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972) or "development," *United States v. Torres*, 519 F.2d 723, 727 (2d Cir. 1975).

* As Ebbecke acknowledges, the admissibility of similar act evidence is governed by F.R. Evid. 404(b), which provides:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

The recent cases in this Circuit allowing the admission of such evidence are legion. See, in addition to decisions cited elsewhere in this brief, *United States v. Cyphers*, 556 F.2d 630, 634 (2d Cir. 1977); *United States v. Nemes*, 555 F.2d 51, 52 (2d Cir. 1977); *United States v. Cavallaro*, 553 F.2d 300, 305 (2d Cir. 1977); *United States v. Braunig*, 553 F.2d 777, 781 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3790 (June 6, 1977); *United States v. Grady*, 544 F.2d 598, 604 (2d Cir. 1976); *United States v. Stassi*, 544 F.2d 579 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977); *United States v. Erb*, 543 F.2d 438, 442 (2d Cir.), *cert. denied*, 429 U.S. 981 (1976); *United States v. Viruet*, 539 F.2d 295, 297 (2d Cir. 1976); *United States v. Payden*, 536 F.2d 541 (2d Cir. 1976);

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Hempstead Bank transaction was indeed very similar to his activities with LeVien. In each case, the essential element was Ebbecke's participation in a fraudulent scheme to deceive victims of the true nature of a bank's obligations to them. More particularly, in each case Ebbecke adopted the identical procedure of falsely telling a victim that a bank had extended credit to him, and then stalling for time before the inevitable discovery of the deceit by obtaining the false assurances of a bank officer. Especially since, in each case, Ebbecke's relationship with a corrupt bank officer—that is, Wadsworth in one instance, LeVien in the other—and his active connivance in false representations made by them constituted the core of the fraud, the similarity is obvious. See, e.g., *United States v. Kaufman*, 453 F.2d 306 (2d Cir. 1971) (false statements on a personal income tax return admissible to show violations of the Soldiers' and Sailors' Civil Relief Act); *United States v. Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976) (false statements in an affidavit admissible in income tax case). In short, the evidence was clearly of great probative value.*

United States v. Chestnut, 533 F.2d 40, 49-50 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976); *United States v. Santiago*, 528 F.2d 1130, 1134-1135 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *United States v. Natale*, 526 F.2d 1160, 1173-1174 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States v. Gerry*, 515 F.2d 130 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States v. Eliano*, 522 F.2d 201 (2d Cir. 1975); *United States v. Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). See generally, *United States v. McCarthy*, 473 F.2d 300 (2d Cir. 1972); *United States v. Deaton*, 381 F.2d 114 (2d Cir. 1967).

* As this Court has noted in connection with the admissibility of similar acts in a case involving the uttering of forged checks,

"Many innocent persons might accompany their friends to one, two or even seven banks without realizing that their companion was in the process of attempting to negotiate forged checks. However, it would be wholly unrealistic to assume that [the defendant], who had previously engaged in the business of cashing forged cheques, would not have sur-

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Rather, Ebbecke's claim appears to be that the obvious probative value of the evidence was "substantially outweighed", F.R. Evid. 403; *United States v. Araujo*, 509 F.2d 287, 290 (2d Cir.), *cert. denied*, 429 U.S. 983 (1976), by the danger of unfair prejudice or confusion. In making this claim, Ebbecke ignores both the record before this Court and the breadth of the trial court's discretion in this area. First, the similar act testimony simply did not have the confusing impact Ebbecke ascribes to it.* Despite the imprecision caused by Ebbecke's evasive testimony, see

mised from [his accomplice's] activities that a forgery was being perpetrated in at least some of the seven banks they visited or that he had no interest in the venture."

United States v. Klein, 340 F.2d 547, 549 (2d Cir. 1965). In this case, it was indeed "wholly unrealistic" that one who only a few months previously had dealt with a corrupt bank officer for his benefit and used fraudulent bank documents was nonetheless a wholly innocent participant in a scheme with another corrupt bank officer and was wholly unknowing of the use to which false loan commitments were put.

This Court's recent decision in *United States v. Corey*, Dkt. No. 77-1308, slip op. 585 (2d Cir., November 30, 1977), is not the contrary. To the extent that the panel's "assumption" of error in that case was more than dictum, the apparent perceived difficulty stemmed from the length of time between the similar acts and the facts alleged in the indictment—hardly the case here, where the two were separated by only a few months—and by the fact that the similar act involved falsification of Corey's personal records, while the facts at trial involved his knowledge of documents falsified by "third parties." Here, of course, the issue in both instances was Ebbecke's participation in the activities of a corrupt bank officer, and thus the dissimilarity perceived in *Corey* does not exist.

* Ebbecke also hints that the Government's proof of the similar act was insufficient to meet some legal burden, in that it was not "clear and convincing proof of a similar act." (Br. 31). This Court, however, has explicitly rejected the notion that similar act proof must be "plain, clear and conclusive;" rather, the test—as with the admissibility of any relevant fact, see *Lego v. Twomey*, 404 U.S. 477 (1972)—is whether the similar act is demonstrated by a mere preponderance of the evidence. *United States v. Leonard*, *supra*, 524 F.2d at 1090-91.

p. 30, *supra*, at note, Ebbecke's denial and Wadsworth's affirmation that Ebbecke knowingly induced Wadsworth to falsify a bank document was presented to the jury with crystal clarity.* Furthermore, one aspect of the matter that Ebbecke contends somehow heightened the prejudicial effect of the evidence in fact demonstrates the eminently fair manner in which the issue was handled by Judge Ward. Ebbecke claims that "[t]he fact that this evidence came in on rebuttal" contributed to the prejudice and confusion. (Br. 34). In fact, this Court has on several occasions encouraged judges to postpone a determination on the admissibility of such evidence "until after the presentation of the defendant's case when there would have been a better opportunity to appraise the prosecution's need for it." *United States v. Leonard, supra*, 524 F.2d at 1092; *United States v. Kaufman, supra*, 453 F.2d at 311. Judge Ward's deliberate decision to exclude the evidence until Ebbecke had clearly isolated his knowledge and intent as the crucial issues before the jury (and had denied the facts the Government was prepared to prove) was thus eminently correct.**

Finally, of course, this Court's ambit of review in assessing the correctness of Judge Ward's decision is exceedingly narrow. As noted in a prior similar act decision,

* If the matter had been as confusing as Ebbecke now contends, his trial counsel might have been expected to reap benefits from the confusion during his summation, or at least to dispute the obvious inferences to be drawn from the testimony. Rather he wisely ignored the matter entirely.

** "[W]hen the crime charged involves the element of knowledge, intent, or the like, the [Government] will often be permitted to show other crimes in rebuttal, after the issue has been sharpened by the defendant's giving evidence of accident or mistake, more readily than it would as part of its case in chief at a time when the Court may be in doubt that any real dispute will appear on the issue." McCormick, *Evidence* 331 (1954), quoted in *United States v. Ross, supra*, 321 F.2d at 67.

"In any case, the weighing of the probative value of the evidence against its potentially prejudicial effect is primarily for the trial judge who has a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain. We said in *United States v. Ravich*, 421 F.2d 1196, 1203-04 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970), citing *Cotton v. United States*, 361 F.2d 673, 676 (8th Cir. 1966); and *Wangrow v. United States*, 399 F.2d 106, 115 (8th Cir.), *cert. denied*, 393 U.S. 933 (1968), that 'his determination will rarely be reversed on appeal'."

United States v. Leonard, *supra*, 524 F.2d at 1092. See also *United States v. Rosenwasser*, 550 F.2d 806, 809 (2d Cir. 1977); *United States v. Robinson*, 560 F.2d 507, 515 (2d Cir. 1977) (*en banc*) (review of a determination that the possibility of prejudice does not outweigh the probative value of evidence will only lie if the action is "arbitrary" or "irrational"). Particularly, where the similar act evidence was of precisely the same tenor as the direct evidence against Ebbecke, and "was hardly the equivalent of a bloody shirt . . ., a dying accusation of poisoning . . ., or a claim of homosexuality . . .", see *United States v. Leonard*, *supra*, 524 F.2d at 1091 (citations omitted), the evidence simply could not be viewed as having "overwhelmed" the other proof.* In short, Judge Ward acted well within his discretion.

* As this Court phrased the formulation for the admissibility of evidence of this sort, "Evidence of prior criminal acts is admissible *unless offered solely* to prove criminal character or disposition or the proffered evidence is of such a highly prejudicial nature as to *overwhelm* its probative value." *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977) (emphasis added).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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